91-1842

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES MCCRORY, *et al.*,

Petitioners

v.

THE RESOLUTION TRUST CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Federal statute 12 U.S.C. § 1823(e)(4) provides that federal bank regulators, when taking over a failed depository institution, may disregard an agreement which limits a borrower's liability on a note,[1] if the agreement has not "been, continuously, from the time of its execution, an official record of the depository institution." Prior to takeover by federal regulators, the petitioners entered into a validly executed liability-limiting agreement with a depository institution.

The questions presented are:

1) Whether the phrase "official record of the depository institution" encompasses those records of the depository institution which are not physically on the premises of the depository institution, but are maintained in off-premises storage by a duly authorized agent and custodian of the depository institution.

2) Whether court-sanctioned disregard of an agreement limiting a borrower's liability, based on 12 U.S.C. § 1823(e)(4), deprives an individual of constitutional due process, where a federal agency has not made a proper showing that the agreement has not "been, continuously, from the time of its execution, an official record of [a] depository institution."

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[1] Or other asset of the institution.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Charles McCrory, Margaret A. McCrory, J. Walter McCrory, Thomas J. Ryan, and First Florida Management Associates, and the respondent, The Resolution Trust Corporation.[2]

The parties now before this Court are all those parties in the proceedings below, and no others.

[2] The Resolution Trust Corporation is the receiver of Sunbelt Savings, F.S.B., formerly a party to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, Cause No. 91-1079, entered against the petitioners on January 15, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 951 F.2d 68, and is reprinted in the appendix hereto, p. A-1, *infra.*

The memorandum decisions of the United States District Court for the Northern District of Texas (Sanders, D.J.) have not been reported. These are reprinted in the appendix hereto, pp. B-1, C-1, *infra.*

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1332(a)(1), the respondent's predecessor in interest brought this suit in the United States District Court for the Northern District of Texas. The Northern District ruled in favor of the respondent's motions for summary judgment and, accordingly, entered judgment against the petitioners on December 18, 1990.

The petitioners made a timely appeal of the district court's decision to the United States Court of Appeals for the Fifth Circuit. On January 15, 1992, the Fifth Circuit affirmed the decision of the district court. Subsequently, the petitioners filed timely requests for both a rehearing and a rehearing en banc. The Fifth circuit denied both requests on February 11, 1992.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1823 (e)(4). Agreements against interest of Corporation

No agreement which tends to diminish or defeat the interest of the [Resolution Trust] Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution.

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On or about June 1, 1986, Charles and Margaret McCrory *("the McCrorys")* executed a promissory note payable to Sunbelt Savings Association of Texas *("Old Sunbelt")* in the amount of $6,800,000.00. The funds received from this note were to be used to purchase and operate an apartment complex in Dallas, Texas. The note was secured by a deed of trust on the apartment complex.

On July 23, 1987, the McCrorys and Old Sunbelt entered into an assumption agreement with North Park Terrace, Ltd. *("North Park")*, a limited partnership. In brief, this agreement involved the McCrorys transferring the title of the apartment complex to North Park, with North Park infusing $1,000,000.00 into renovations of the property and assuming

the balance of the debt owed on the June 1, 1986 promissory note.

At the time of the agreement, the general partner of North Park was First Florida Management Associates *("FFMA")*. The general partners of FFMA, in turn, were Tom Ryan and Walter McCrory, brother of Charles McCrory. Both Tom Ryan and Walter McCrory executed the above-referenced assumption agreement in their capacities as the general partners of FFMA.

As an integral part of the assumption agreement, Tom Ryan and Walter McCrory insisted on, and Old Sunbelt executed, a "Letter of Agreement" which provided:

> Notwithstanding anything contained in the Loan Documents relating to the transfer of the Property or to the assumption of certain liabilities and obligations by Transferee [North Park Terrace, Ltd.], neither First Florida Management Associates nor its general partners, Thomas J. Ryan, III and J. Walter McCrory, shall be personally liable for any obligation or liability of Transferee to Noteholder [Old Sunbelt] set forth in the Loan Documents beyond First Florida Management Associates' interest in the Transferee and in the Property.
>
> This letter may be executed in multiple counterparts, each of which shall be fully effective as an original and all of which shall constitute one and the same agreement.

The Letter of Agreement was executed by R. Alan Doan, executive vice president and authorized officer of Old Sunbelt, contemporaneously with North Park's signing of the assumption agreement. The chairman of Old Sunbelt's loan committee also approved the Letter of Agreement and the limitation of liability for the FFMA general partners.

It is uncontroverted that in executing this Letter of Agreement, all parties concerned intended to limit the liability of Tom Ryan and Walter McCrory, in respect to amounts owed on the June 1, 1986 promissory note, to the interest which they and FFMA held in North Park. Furthermore, it is uncontroverted that the language of the Letter of Agreement accomplished this intention.

John Fox, outside counsel for Old Sunbelt, handled the closing of the assumption transaction on behalf of Old Sunbelt. At the closing, Fox received an executed copy of the Letter of Agreement and continuously retained this copy in the closing binder which he maintained as a client file. The closing binder which FFMA received also contained an executed copy of the Letter of Agreement.

On August 19, 1988, approximately one year after the parties consummated the entire assumption agreement, Old Sunbelt failed and the Federal Savings and Loan Insurance Corporation *("FSLIC")* was appointed receiver. (This event is herein referred to as "the take-down" of Old Sunbelt). FSLIC then transferred certain assets of Old Sunbelt, including the June 1, 1986 promissory note, to the newly created Sunbelt Savings, F.S.B. *("New Sunbelt")*.

Due to a severe downturn in the Texas economy, North Park failed to make all payments required under the June 1, 1986 promissory note. As a consequence, New Sunbelt filed a lawsuit in the United States District Court for the Northern District of Texas seeking to recover the indebtedness on the note from the McCrorys and North Park. Shortly afterward, North Park filed a Chapter 11 bankruptcy petition. In response to the bankruptcy petition, New Sunbelt non-suited North Park and added FFMA, Walter McCrory, and Tom Ryan as party-defendants.

Being named defendants, Walter McCrory and Tom Ryan brought the Letter of Agreement to the attention of both New Sunbelt and the district court. New Sunbelt claimed,

however, that the Letter of Agreement was not in the closing binder on file at the premises of Old Sunbelt on the date of Old Sunbelt's take-down. New Sunbelt further claimed that under the *D'Oench, Duhme* doctrine, this mandated that the court disregard the Letter of Agreement.

The *D'Oench, Duhme* doctrine originated with the case of *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942). The doctrine essentially holds that parties to a note with a failed bank may not assert, as defenses to payment of the note, agreements or promises not on the records of the failed institution. The *D'Oench, Duhme* doctrine purportedly protects federal banking agencies from "side agreements" not readily available to bank examiners. *Kilpatrick v. Riddle*, 907 F.2d 1523, 1527 (5th Cir. 1990). The doctrine particularly applies where a party has "lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled." *D'Oench, Duhme*, 315 U.S. at 460.

In applying *D'Oench, Duhme*, the district court was not persuaded that the parties' Letter of Agreement constituted an official record of Old Sunbelt because the agreement, though maintained by Old Sunbelt's counsel, was not on the physical premises of Old Sunbelt at the time of take-down. The court, thus, granted New Sunbelt's summary judgment motion. In granting this motion, it should be noted that the court was seemingly unconcerned by New Sunbelt's failure to produce any evidence that, *at the time of take-down*, the Letter of Agreement was not filed on the premises of Old Sunbelt. Indeed, the only evidence offered by New Sunbelt even relating to this point was the affidavit of a New Sunbelt officer stating that upon examination *in the Spring of 1990, nearly one and a half years after Old Sunbelt's take-down*, he could not locate the Letter of Agreement in the Old Sunbelt files transferred to New Sunbelt.

In due course, the petitioners appealed the district court's decision to the United States Court of Appeals for the

Fifth Circuit. While this appeal was pending, New Sunbelt also failed. The Resolution Trust Corporation ("*RTC*") was appointed as its receiver.

The RTC continued the further prosecution of New Sunbelt's lawsuit, relying on the *D'Oench, Duhme* doctrine and alternatively asserting a defense under 12 U.S.C. § 1823(e)(4). Section 1823(e)(4) is essentially the codification of the *D'Oench, Duhme* doctrine. With relevant prefatory language, Section 1823(e)(4) states:

> No agreement which tends to diminish or defeat the interest of the [Resolution Trust] Corporation in any asset . . . shall be valid . . . unless such agreement — . . .
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

After hearing oral argument, the Fifth Circuit found that the Letter of Agreement, though in the custody of Old Sunbelt's attorney and subject to Old Sunbelt's control, did not constitute "an official record of the depository institution" under Section 1823(e)(4). As such, the court did not reach the question of whether *D'Oench, Duhme* also barred consideration of the agreement.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's refusal to recognize the records of an official bank agent as "bank records" improperly extends the statutory requirement contained in 12 U.S. C. § 1823(e)(4).

The Fifth Circuit acknowledged in its opinion that it could find no cases interpreting the phrase "official record of the depository institution" as contained in 12 U.S.C. § 1823(e)(4). The petitioners and respondent have likewise been unable to find any cases to this effect. Accordingly, it is

necessary for this Court to give guidance to the courts below by interpreting the phrase consistent with its natural meaning and without imposing any obligations not embodied in the statute. It is extremely important that this issue be correctly decided since it has far-reaching implications and non-resolution could wreak havoc on those who transact with banks or savings and loans which later fail.

Faced with this lack of guidance, the Fifth Circuit held an "official record of the depository institution" to reference solely documents residing on the physical premises of a failed institution. In essence, this interpretation extends a location-specific element to the statutory requirement contained in Section 1823(e)(4).

Such an extension is neither warranted by the language of the section nor by the logic underpinning the section. Section 1823(e)(4) merely mandates that in order to be enforceable an agreement must be an "official record of the depository institution." This language simply does not make any location-specific references, not even impliedly. The language does not say that the agreement must be "kept on the physical premises" of the institution. Indeed, given the branch banking practices of today, the inclusion of such language might lead to controversy over which branch contained the truly "official" records of a particular transaction. The Fifth Circuit's interpretation of Section 1823(e)(4) lends itself to just such a dispute.

In truth, the location-neutral language of Section 1823(e)(4) is tacit recognition that the records of particular depository institutions are recorded and maintained in a myriad of different ways and at a myriad of different locations. Indeed, the breadth of the language is a recognition that the record of a failed institution is not less a record merely because it is stored with the institution's outside counsel, or any similar custodian, at an off-premises storage facility. Certainly the institutions themselves make no such distinction. As such, the key inquiry as to whether a record or document is

an "official record" should not be: where was the document stored at the time of take-down? Rather, logic and common practice dictate the inquiry be: was the document executed by the failed institution with proper authorization and, after execution, was the document subject to the failed institution's control? It simply should not matter whether the document has to be retrieved from an off-premises site or from an agent acting as a custodian of that record.

The evidence presented to the district court below established that the parties' Letter of Agreement met with all the requisites of Section 1823(e)(4). The agreement was: 1) executed by a duly authorized agent of Old Sunbelt, 2) executed on the same date as the parties' assumption agreement, and 3) remained in the custody of the Old Sunbelt agent who closed the transaction, John Fox, Esq., from the date of its execution until after the take-down of Old Sunbelt. Furthermore, the evidence established that the agreement, being continuously in the custody of Old Sunbelt's agent and thus being unequivocally available to Old Sunbelt, met the inquiry set forth above; namely, the agreement was at all times subject to Old Sunbelt's control. As such, the agreement meets the requirement of Section 1823(e)(4).

II.

Old Sunbelt's attorney was its agent in closing the transaction upon which this suit is based and, therefore, his files constitute the official records of the depository institution.

It is hornbook law that clients can make agents of their attorneys for many purposes. For example, representations made to a court by counsel are binding upon a client even if made without express authorization. Similarly, a settlement agreement is binding upon a client if entered into by counsel, regardless of whether the agreement was actually authorized

by the client. And likewise, a party can "close" a contractual transaction by using counsel as its agent.

In each of the above examples the attorney, as agent, is entrusted with client documents, files, and records. As is well known, these documents, files, and records are not the property of the attorney, but are owned by the client and are subject to the client's control. Such control is regularly manifested. A prime illustration is the transfer of files from one law firm to another when a client decides to change representation. The attorneys in such situations readily recognize their mere custodial rights in the files.

Recognizing this control, clients in many instances rely upon counsel to keep accurate and complete files and, when needed, simply contact counsel to retrieve them. Old Sunbelt utilized this practice. According to the attorney who closed the transaction involving appellants, Old Sunbelt had contacted him on numerous occasions requesting files on loans his firm had closed. In some instances this occurred where the files had been misplaced or lost by Old Sunbelt personnel. Indeed, it was quite evident that Old Sunbelt relied on its counsel to keep complete copies of Old Sunbelt's files.

The Fifth Circuit's ruling that an attorney's maintenance of a client's files does not involve either a custodial or agency relationship, that such files are not under the control of the client, and that, therefore, the documents included in such files cannot constitute a client's official records, ignores both well-established precedent and practical reality.

A ruling that the official records of a depository institution include those records held in the custody of the institution's counsel, however, would appropriately recognize legal and practical reality. Moreover, such a ruling would dovetail perfectly with the stated purpose behind Section 1823(e)(4): to allow bank examiners to rely on a depository institution's assets when evaluating bank asset worth. For bank examiners are not limited to reviewing solely those records physically

maintained at all times on an institution's premises. Indeed, doing so would not be proper due diligence. Examiners, therefore, review files kept by counsel and other custodians. For example, an institution's litigation files must be poured over in order to determine the potential worth of claims both asserted by and against the institution — such claims representing assets and debts.

Accordingly, holding records maintained in the custody of an institution's attorney to be official records of a depository institution would satisfy legal precedent, practical reality, and the underlying purpose of Section 1823(e)(4). Such a holding would also uphold the rights of individuals who deal with depository institutions in good faith.

III.

No statute should be construed to penalize individuals who have taken all reasonable steps to protect their interests.

During oral argument to the Fifth Circuit, Judge Politz asked the question: what more could Walter McCrory and Tom Ryan have done to better protect their interests? This question, posed in a tone of incredulity, is the overwhelming response given when presented with the facts of this case. Indeed, the near automatic nature of this response underscores the inequity involved in construing Section 1823(e)(4) in the manner eventually adopted by the Fifth Circuit.

Certainly, the intent in adopting Section 1823(e)(4) was not to produce a windfall for mismanaged and failed institutions at the expense of innocent lenders and borrowers. Rather, the statute was adopted, and has been utilized, as a codification of the *D'Oench, Duhme* doctrine. *See Bell & Murphy & Assoc. v. Interfirst Bank Gateway*, 894 F.2d 750, 753 (5th Cir. 1990). The undisputed impetus behind *D'Oench, Duhme* was to protect governmental banking authorities

from any borrower who "lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." *D'Oench, Duhme & Co. v. FDIC*, 315 U.S 447 (1942). This goal is obviously not furthered by holding innocent borrowers, like Tom Ryan and Walter McCrory, liable for debts which all agree they had not accepted.

Again, what more could Tom Ryan and Walter McCrory have done to protect themselves from being saddled with more than $5,000,000 worth of personal liability where they were to have none? They were represented by counsel at closing. They made sure a Letter of Agreement, stating clearly they were to have no personal liability, was executed at the time of closing and signed by a senior loan officer of Old Sunbelt. They witnessed the Letter of Agreement being given to Old Sunbelt's representative and attorney. And, they kept an original copy of the Letter of Agreement. When sued personally, they brought the agreement to the attention of the proper authorities and, quite naturally, assumed that would resolve any controversy. There was nothing more, short of hiring a guard to stand over Old Sunbelt's files, the two could have done to assure that Old Sunbelt continued to maintain a copy on-premises at the time the regulators took over the institution.

The Fifth Circuit was not in a situation where it had no alternative but to deprive Walter McCrory and Tom Ryan of their written contractual rights. The statute, as explained above, can be interpreted in such a way to protect the government's rights, while not eradicating those of the individual. The petitioners, therefore, are not seeking to engraft an equitable exception on to the statute. Rather, petitioners simply ask that the term "official record of the depository institution" be interpreted in a manner which does not penalize those who take all reasonable steps to protect their interests.

Ironically, the Fifth Circuit itself recently held that the policy behind Section 1823(e) ensures that a federal banking

agency will not be "disadvantaged by the circumstances of its assumption of control, but this policy does not require giving the FDIC the ability to transmute lead into gold." *Sunbelt Savings, FSB Dallas v. Montross*, 923 F.2d 353, 357 (5th Cir. 1991). The petitioners request that this Court, unlike the courts below, heed these words of wisdom and caution. The respondents should not be allowed to transmute lead into gold; they should not be allowed to transmute what everyone admits is limited liability into unlimited liability.

IV.

The petitioners' rights to constitutional due process were violated, as no showing, or alternatively, an insufficient showing, was required to deprive them of both liberty and property.

Amendment V to the United States Constitution mandates to the federal government that "No person shall . . . be deprived of life, liberty, or property without due process of the law." In allowing the Resolution Trust Corporation to disregard the contractual rights of the petitioners without the requirement of a proper showing as to the factual basis for this disregard, the Fifth Circuit has sanctioned an agency of the federal government to deprive the petitioners of both liberty and property. Specifically, the Fifth Circuit has not required the Resolution Trust Corporation to make a proper showing that, at the time federal regulators seized Old Sunbelt, the petitioners' Letter of Agreement was not contained in the files maintained on the premises of the failed institution.

Given the current condition of the United States' financial community, allowing the Resolution Trust Corporation to, in effect, unilaterally decide which contractual agreements of a failed depository institution it will honor and which it will dishonor, affects the rights of a vast number of individuals and entities. That substantial property interests are at

stake in allowing the government agency such power is illustrated by the present case. The petitioners had signed a contractual agreement restricting their liability on a promissory note to their holdings in a limited partnership. Allowing the Resolution Trust Corporation to unilaterally disregard this agreement, however, has subjected the petitioners to personal liability, totalling over $5,000,000.00. Having to assume this liability undoubtedly will force several of the petitioners into bankruptcy. Likewise, other individuals, having entered into valid contractual agreements with a failed depository institution, may find their property seemingly vanish at the whim of federal regulators.

Beyond this deprivation of property, there is also a substantial liberty interest to consider — the right of an individual to contract. See *Meyer v. Nebraska*, 262 U.S. 390, 394 (1923). Obviously, allowing an agency of the federal government to unilaterally abrogate valid contractual obligations is a violation of this fundamental right.

The question thus becomes: what process are the petitioners' due? The petitioners realize that the rights to liberty and property are not absolute, that occasionally important interests of the federal government will necessitate infringement upon these rights. The Constitution mandates, however, that checks be put on this infringement, that the federal government not be allowed to make arbitrary decisions. U.S. CONST. amend. V. The petitioners maintain that such checks were not placed upon the Resolution Trust Corporation.

In determining what procedures are necessary when an important interest of the federal government is set against an individual's rights to liberty and property, this Court has found that a "balancing test," weighing the costs of requiring a particular set of procedures against the benefits from the use of those procedures, should be employed. *Mathews v. Eldridge*, 424 U.S. 319 (1976). To be weighed on the side of individual rights are: 1) the strength of the private interest affected by governmental action, 2) the risk of an erroneous

deprivation of such interest through the procedures used, and 3) the probable value of additional or substitute procedural safeguards. *Id.* at 334-35. To be weighed on behalf of the government is "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

In the present situation, the government has an important interest in allowing federal regulators the ability to quickly and effectively ascertain the financial status of a depository institution. The government's overall interest, however, is assuring the integrity of the nation's financial community. Arguably, allowing federal regulatory agencies to disregard those contractual agreements of a failed institution which are not found, at the time of take-down, on the premises of a failed institution furthers this interest.[3]

However, requiring a federal regulatory agency which asserts that a certain agreement was not kept on the premises of a failed institution at the time of take-down to come forth with evidence that the agreement was, in fact, absent does not interfere with the government's interests. Indeed, such a requirement does not place an undue burden upon federal regulators. The regulators could easily submit an inventory of documents, taken at the time of take-down, showing the agreement's absence.[4] Or, in the alternative, the regulators could submit an affidavit of an examiner attesting to the

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[3] The petitioners still contend that "official records" of a depository institution, as defined under 12 U.S.C. § 1823(e)(4), do not include solely those records kept on the physical premises of the institution.

[4] It should be noted that the petitioners attempted to obtain the examination reports of the federal regulators to determine if the Letter of Agreement had ever been referenced in those reports. This request was opposed by appellee on the grounds of privilege and appellants' motion to compel was denied.

absence of the agreement at the time of take-down.[5] Producing such evidence obviously would entail very little effort.

Weighing against this nearly negligible burden are 1) the substantial liberty and property rights discussed above, 2) the risk that federal regulators will either misplace, lose, or fail to take notice of a single agreement when taking over the entire files of a failed institution, and 3) the value of providing safeguards for innocent individuals who deal honestly with financial institutions. These considerations, quite simply, overwhelm the burden to be imposed on the government. The risk that federal regulators will either misplace, lose or fail to take notice of a single agreement is almost not a risk, but a certainty, when considering the amount of documentation kept by financial institutions and the frantic atmosphere of a government takeover of such an institution. Furthermore, the value of providing safeguards for innocent individuals, like the petitioners, who deal honestly with a financial institution, take all steps reasonably possible to ensure that their transactions are recorded, and keep accurate files of these transactions in case of any mishap, is extremely compelling.

The petitioners, therefore, urge the Court to constrain the Resolution Trust Corporation from trampling upon the liberty and property interests of those who have dealt fairly with failed depository institutions. Specifically, the petitioners urge the Court to recognize that due process, in the present context, requires the Resolution Trust Corporation to make a proper showing that the Letter of Agreement was not in files of Old Sunbelt.

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[5] The only evidence which the respondents have entered in this regard is an affidavit of a New Sunbelt officer stating that, after searching Old Sunbelt's files at the behest of the petitioners in the Spring of 1990, some one and a half years after the take-down of Old Sunbelt, he could not find the Letter of Agreement.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel of Record

Counsel for Petitioners

May 11, 1992

CERTIFICATE OF SERVICE

I, Hubert A. Crouch, III, a member of the Bar of this Court, hereby certify that on this 11th day of May, 1992, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage repaid, to:

W. Alan Wright
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Counsel for Petitioners

RESOLUTION TRUST CORPORATION,
Plaintiff-Counter-Defendant-Appellee,

v.

Charles McCRORY, et al.,
Defendants-Counter-Plaintiffs-Appellants.
No. 91-1079.

United States Court of Appeals,
Fifth Circuit.

Jan. 15, 1992.

Payee bank brought action to recover on note. The United States District Court for the Northern District of Texas, Barefoot Sanders, Chief Judge, entered summary judgment in favor of payee. Resolution Trust Corporation (RTC) was appointed conservator, and appeal was taken. The Court of Appeals, King, Circuit Judge, held that: (1) argument of RTC, relying on statutory prohibition against claim or defense based on agreement unless that agreement meets certain conditions, could be considered for first time on appeal, and (2) letter agreement in "draft documents" file of bank's outside attorney was not "official record of the depository institution" within meaning of statute prohibiting claim or defense based on agreement unless agreement has been official record of the depository institution.

Affirmed.

1. Building and Loan Associations ⇦ 48

"Bridge bank" which was assignee of Federal Savings and Loan Insurance Corporation (FSLIC) was authorized to invoke *D'Oench, Duhme* doctrine in its own behalf.

2. Federal Court ⇦ 776

Entry of summary judgment is reviewed de novo, applying same substantive test as district court.

3. Federal Courts ⇦ 612

Argument of Resolution Trust Corporation (RTC), relying on statutory prohibition against claim or defense based on agreement unless that agreement meets certain conditions, could be considered for first time on appeal where trial court had entered judgment in favor of savings bank, and where RTC was then appointed as conservator. Federal Deposit Insurance Act, § 2[13], 12 U.S.C.A. § 1823(e).

4. Banks and Banking ⇦ 505
Building and Loans Associations ⇦ 42(1)

Letter agreement in "draft documents" file of bank's outside attorney was not "official record of the depository institution" within meaning of statute prohibiting claim or defense based on agreement unless agreement has been official record of the depository institution, even though attorney kept offices in same building and on same floor as bank. Federal Deposit Insurance Act, § 2[13](e)(4), 12 U.S.C.A. § 1823(e)(4).

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, KING and JOHNSON, Circuit Judges.

KING, Circuit Judge:

The defendants in this case appeal the summary judgment entered by the district court in favor of Sunbelt Savings, FSB (Sunbelt) — a failed savings bank whose successor is under the conservatorship of the Resolution Trust Corporation (RTC). Sunbelt brought this action on a note made by two of the defendants. The other defendants (who assumed all obligations under the note in a later transaction) defended on the basis of a letter agreement with Sunbelt which limits

their liability. The district court entered summary judgment based on the *D'Oench, Duhme* doctrine, because the letter agreement was not found in Sunbelt's files. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 460, 62 S.Ct. 676, 680, 86 L.Ed. 956 (1942).

After the district court's judgment had been appealed to this court, RTC was substituted as conservator for Sunbelt's successor. On appeal, RTC argues that the district court properly applied *D'Oench, Duhme* to this case, and argues alternatively that 12 U.S.C. § 1823(e) bars any claims or defenses based on the letter agreement. We agree that § 1823(e) applies to this case, and affirm the district court's judgment on that ground. We do not reach the question of whether *D'Oench, Duhme* would require us to come to the same conclusion.

I. BACKGROUND

In 1986 Charles and Margaret McCrory executed a promissory note payable to Sunbelt's predecessor (Old Sunbelt) for $6.8 million. This note was secured by a deed of trust lien on North Park Terrace apartments. In 1987 the McCrorys and Old Sunbelt entered into another transaction (the assumption agreement) by which title to the apartments was transferred from the McCrorys to North Park Terrace, Ltd. (NPT), a Florida limited partnership. The general partners of NPT were Charles McCrory and First Florida Management Association (FFMA).[1] Walter McCrory and Thomas Ryan are general partners of FFMA. According to the terms of the assumption agreement, NPT assumed all of the original obligations of the McCrorys under the original note. The assumption agreement also provided that the McCrorys

[1] In 1989 NPT filed for voluntary bankruptcy under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 1101-1174, and is consequently not a party to this litigation.

remained liable for their obligations under the note notwithstanding the assumption of those obligations by NPT. Simultaneously with the execution of the assumption agreement, however, Old Sunbelt executed a letter agreement limiting the liability of FFMA, along with its general partners Walter McCrory and Thomas Ryan, to the extent of their interest in NPT. Neither the executed letter agreement nor any copy of it was included in Old sunbelt's files.[2] A copy of the letter agreement was retained in the "draft (documents)" file of the attorney who handled the closing for Old Sunbelt.

In 1988 the Federal Home Loan Bank Board declared Old Sunbelt insolvent and appointed the Federal Savings and Loan Association (FSLIC) receiver. FSLIC and Sunbelt then executed an acquisition agreement which transferred certain assets, including the original note and the assumption agreement, from FSLIC to Sunbelt. Following August 1988, the McCrorys and NPT failed to make the payments required under the note and assumption agreement. Sunbelt then accelerated the indebtedness under the note, making all unpaid amounts immediately due. To recover the indebtedness under the note, Sunbelt instituted this lawsuit.

[1] The district court entered summary judgment in favor of Sunbelt, finding that the absence of the letter agreement from Sunbelt's files entitled Sunbelt to the protection of

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[2] Two documents in Old Sunbelt's files referred to the letter agreement, but didn't not disclose the limitation of liability. There is no record of the letter agreement or the liability limitation in the minutes of the loan committee. An official of Old sunbelt testified that the loan committee neither considered nor approved the assumption agreement, since the transaction was not considered a restructuring of the original note. The official testified that the chairman of the senior loan committee approved the transaction, including the limitation of liability. *Cf. 12 U.S.C. § 1823(e)(3).*

the *D'Oench, Duhme* doctrine.[3] In doing so, the district court found that FFMA, and its general partners Walter McCrory and Thomas Ryan, could not rely on the defense that their liability was limited by the letter agreement, since that defense was grounded entirely in an agreement which was not contained in Old Sunbelt's records.[4]

After entry of final summary judgment by the district court, the Office of Thrift Supervision (OTS) declared Sunbelt insolvent and appointed the RTC receiver. Another acquisition agreement, this time between RTC and Sunbelt Federal Savings, FSB (Sunbelt Federal), transferred certain assets, including the final judgment entered in the district court on the note and assumption agreement, from RTC to Sunbelt Federal. On the same day, OTS placed Sunbelt Federal into conservatorship and appointed RTC conservator. RTC consequently succeeded to all rights of Sunbelt Federal, including the right to collect the final judgment in this case. *See* 12 U.S.C. §§ 1441a(b)(4) and 1821(d)(2)(B)(ii). During the

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[3] Sunbelt was authorized to invoke the *D'Oench, Duhme* doctrine in its own behalf as a bridge bank which was an assignee of FSLIC. *See Bell & Murphy & Assoc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754-55 (5th Cir.), *cert. denied*, —U.S.—, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990).

[4] The district court also entered summary judgment against Charles and Margaret McCrory, noting that their defenses, based on claims of breach of contract and usurious interest, had been expressly released in the assumption agreement. The McCrorys had argued that the consideration for such release was Old Sunbelt's promise (in the letter agreement) to limit the liability of FFMA and its general partners Walter McCrory and Thomas Ryan. Since that promise had been broken, the McCrorys contended that their release was invalid for lack of consideration. The district court found adequate consideration on the face of the assumption agreement for the release, and held that the McCrorys consequently cannot rely on the letter agreement as consideration. Although they filed a notice of appeal, the McCrorys have not filed any independant briefs; neither they nor the other defendants have presented any arguments challenging this aspect of the district court's ruling.

course of this appeal, we substituted RTC for Sunbelt as the plaintiff-appellee.

II. STANDARD OF REVIEW

[2] We review the entry of summary judgment de novo, applying the same substantive test as the district court. *FDIC v. Hamilton*, 939 F.2d 1225, 1227 (5th Cir. 1991). Summary judgment is appropriate if, viewing the filings in the light most favorable to the nonmoving party, they "show that there in no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Hamilton*, 939 F.2d at 1227.

III. DISCUSSION

Although the district court decided the parties' summary judgment motions based on the *D'Oench, Duhme* doctrine, RTC argues two grounds for affirmance. First, RTC contends that the district court properly applied *D'Oench, Duhme* to the facts of this case. Alternatively, RTC invokes § 1823(e) in defense of the district court's ruling.

Section 1823(e) prohibits claims or defenses based on an agreement unless that agreement, among other requirements, "has been, continuously, from the time of execution, an official record of the depository institution." 12 U.S.C. § 1823(e)(4). These provisions initially applied only to the Federal Deposit Insurance Corporation (FDIC), but Congress made them applicable to the RTC in 1989. *See* 12 U.S.C. § 1441a(b)(4); *RTC v. Murray*, 935 F.2d 89, 93-94 (5th Cir.1991).

[3] RTC raises this argument for the first time on appeal, as it was not a party to the proceedings in the district court and the argument based on § 1823(e) was not available to Sunbelt. *See FSLIC v. Griffin*, 935 F.2d 691, 698 (5th

Cir.1991), *petition for cert. filed* (Nov.18, 1991); *Bell & Murphy & Assoc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir.), *cert. denied*, —U.S.—, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990). In this case, RTC invokes the argument as an alternative justification for affirmance of the district court's judgment; RTC does not ask us to reverse the district court on the basis of an argument not presented to that court.

We note that, when the district court's judgment establishes that an asset is void, federal regulators appointed after the entry of judgment have not been allowed to assert arguments based on *D'Oench, Duhme* and § 1823(e) for the first time on appeal as an attempt to reverse the district court's judgment. *See Thurman v. FDIC*, 889 F.2d 1441, 1447 (5th Cir.1989); *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266, 275 (5th Cir.1989).[5] In this case, however, the final judgment in favor of Sunbelt represented an asset of Sunbelt which RTC acquired when it stepped in as conservator of Sunbelt Federal. In such a situation, we have permitted federal regulators to assert their special defenses for the first time on appeal. *See Union Fed. Bank v. Minyard*, 919 F.2d 335, 336 (5th Cir.1990); *see also Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1512 (11th Cir.1991); *FDIC v. Castle*, 781 F.2d 1101 (5th Cir.1986). In *Minyard*, we emphasized that the federal regulator had no opportunity to raise its special defense in the trial court, and implied that it should not be penalized on appeal for that lack of opportunity. 919 F.2d at 336; *accord Baumann*, 934 F.2d at 1512-13. Under

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[5] This case is unique in that Sunbelt could and did raise the *D'Oench, Duhme* doctrine in the district court, but could not raise the § 1823(e) argument there. Since the two arguments are so closely related, see *Murray*, 935 F.2d at 93 n. 3, our conclusion does little violence to the district court's reasoning. *Compare Beighley v. FDIC*, 868 F.2d 776, 783-84 (5th Cir.1989) (affirming district court's judgment, which rested on § 1823, under *D'Oench, Duhme* since § 1823 was unavailable to FDIC as receiver), *with Thurman*, 889 F.2d at 1447 (at time judgment was entered five days before receivership was created, no party to the case could have asserted the special defenses).

these circumstances, it is not improper for us to consider the argument for the first time on appeal.

[4] "Congress erected a stout barrier in 12 U.S.C. § 1823(e)." *FDIC v. Cardinal Oil Well Serv. Co.* 837 F.2d 1369, 1372 (5th Cir.1988). That barrier forbids defenses based on an agreement with a failed depository institution unless the agreement meets all four criteria enumerated in § 1823(e). One of the criteria is the requirement that the agreement "has been, continuously, from the time of its execution, an official record of the depository institution." 12 U.S.C. § 1823(e)(4).

In this case, the defendants argue that the letter agreement's presence in the files of the bank's attorney, who kept offices in the same building and on the same floor, is sufficient to meet the requirement. We have found no cases which aid our interpretation of the term "official record of the depository institution." We do not now seek to promulgate any comprehensive definition of that term. We merely hold that the "draft (documents)" file of the bank's outside attorney does not constitute "an official record of the depository institution."

"One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." *Langley v. FDIC*, 484 U.S. 86, 91, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987). Often, such an evaluation must be done literally overnight. *See Id.* For this reason, the Supreme Court has been unwilling "to engraft an equitable exception upon the plain terms of the statute." *Id.* at 94, 108 S.Ct. at 403. Though they deny it, this is exactly what the defendants have asked us to do.[6] We too must decline the request and hew closely to the "plain terms of the statute."

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[6] They argue that affirmance in this case would create a manifest injustice since all parties to the transaction agree that the liability limitation was a legitimate part of the assumption agreement.

The defendants and RTC disagree over the correctness of the district court's interpretation of the *D'Oench, Duhme* doctrine, particularly regarding the existence of a scheme or arrangement likely to mislead federal regulators. Section 1823(e), however, provides a clear statutory standard which is dispositive of the outcome in this case. Since we hold that § 1823(e) provides an adequate basis for affirmance of the district court's summary judgment, we do not reach the thornier question of whether the *D'Oench, Duhme* doctrine would compel the same result. *See, e.g., Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir.1990) (characterizing the doctrine as "the dungeon of *Duhme*").

IV. CONCLUSION

Accordingly, the judgment of the district court is AFFIRMED under the reasoning set forth above.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

SUNBELT SAVINGS, FSB, *Plaintiff* v. CHARLES MCCRORY, MARGARET A. MCCRORY, FIRST FLORIDA MANAGEMENT ASSOCIATES, WALTER MCCRORY AND THOMAS J. RYAN, III, *Defendant*	Civil Action No. 3-89-2474-H

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff's Motion for Summary Judgment, filed May 11, 1990; Defendant's Response, filed August 17, 1990; Affidavit of Benjamin H. Davidson in Support of Plaintiff's Motion for Summary Judgment, filed September 14, 1990; Affidavit of Billy Jones in Support of Plaintiff's Motion for Summary Judgment, filed September 14, 1990; Cross Motion for Summary Judgment for Defendants First Florida Management Associates, Walter McCrory and Thomas Ryan, III, filed August 17, 1990; Plaintiff's Response, filed September 14, 1990; and Reply of Defendants First Florida Management Associates, Walter McCrory and Thomas Ryan, III, filed October 3, 1990.

Facts

On or about June 1, 1986, Charles and Margaret McCrory executed the Modification Wraparound Promissory Note, ("Modification Note"), payable to Sunbelt Savings Association of Texas, ("Old Sunbelt"). The $6,800,000 in

proceeds from the loan were to be used for renovation of an apartment complex.

Walter McCrory, ("W. McCrory"), and Thomas Ryan are general partners of First Florida Management Association, ("FFMA"), a Florida limited partnership. FFMA and Charles McCrory are general partners of North Park Terrace, ("NPT"),[1] another Florida limited partnership.

After executing the note, C. and M. McCrory requested that Old Sunbelt consent to their transferring the property to NPT. In exchange for the property, NPT agreed to put approximately $1,000,000 into the renovations. The consent to the transfer and the conditions imposed upon it are described in a July 23, 1987, Assumption Agreement. *See* Second Affidavit of Billy Jones in Support of Plaintiff's Motion for Summary Judgment, Ex. A (S004394). Under that Agreement, NPT assumed C. and M. McCrory's liabilities under the Modification Note, C. and M. McCrory were not released from their liability, and C. and M. McCrory released all causes of action against Old Sunbelt, including those for usury and breach of contract. *See Id.*, 2004368.

Also on July 23, 1987, R. Alan Doan, a Senior Vice President of Old Sunbelt, executed a letter agreement limiting the liability of FFMA, W. McCrory and Ryan to the extent of their investment in NPT. *See* Defendant's Response to Plaintiff's Motion for Summary Judgment, Ex. B. That letter was sent to W. McCrory and to Ryan, was stored in the "draft" files of the attorney for Old Sunbelt handling the closing of the Assumption Agreement, and was referred to in two letters transmitting documents about the assumption transaction; however, it was not stored in Old Sunbelt's records and was not included in the "closing binder" of Old Sunbelt's attorneys.

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[1] On November 6, 1989, NPT filed for voluntary bankruptcy under Chapter 11 of the United States Bankruptcy Code, and is therefore not included as a defendant.

On August 19, 1988, the Federal Home Loan Bank Board declared Old Sunbelt insolvent and appointed the Federal Savings and Loan Insurance Corporation, ("FSLIC"), as Receiver; FSLIC and Plaintiff Sunbelt Savings, FSB, then executed an Acquisition Agreement, transferring certain assets, including the Modification Note, to Plaintiff Sunbelt Savings, FSB.

C. and M. McCrory and NPT defaulted on the Modification Note. Plaintiff brought this lawsuit seeking recovery on the promissory note and attorney's fees.

Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. A movant for summary judgment need not support the motion with evidence negating the opponent's case. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986). Summary judgment may be entered against a party if after adequate time for discovery, the party fails to establish the existence of an element essential to his or her case and as to which he or she will bear the burden of proof at trial. *Celotex, supra*, 477 U.S. at 324-26. Partial summary judgment is permissable where appropriate. Fed.R.Civ.P. 56(a).

Defendant's Cross Motion for Summary Judgment

In their Cross Motion for Summary Judgment, FFMA, W. McCrory and Ryan argue that the claims asserted against them are barred by the Letter Agreement limiting their liability to the extent of FFMA's investment in NPT and the property. Defendants argue that the *D'Oench, Duhme* doctrine, *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942), does not apply to exclude the Letter Agreement because the Letter Agreement was an integral part of the

assumption transaction, not a scheme likely to mislead bank regulators, and because it would be unjust to find the liability limitation unenforceable merely because a financial institution failed to store it properly in its files.

The *D'Oench Duhme* doctrine precludes borrowers from asserting claims or defenses based upon side agreements, undocumented in the banks records, that would have a tendency to mislead bank regulators. Agreements "not clearly evidenced in the bank's records," and not "apparent to bank examiners" cannot be relied upon. *Beighley* v. *Federal Deposit Ins. Corp.*, 868 F.2d 776, 784 (5th Cir. 1989).

The fact that an agreement was in writing will not prevent exclusion under *D'Oench Duhme*. Written agreements must be stored in bank records so that they are apparent to banking examiners. *Bell & Murphy & Assoc., Inc.* v. *Interfirst Bank Gateway N.A.*, 894 F.2d 750, 753 (5th Cir. 1990). An agreement will be excluded when the absence of documentation has a tendency to mislead banking authorities, regardless of whether or not the borrower intended to mislead. *Campbell Leasing, Inc.* v. *Federal Deposit Ins. Corp.*, 901 F.2d 1244, 1248 (5th Cir. 1990).

Although executed, the agreement at issue here was not contained in the bank's records. The agreement was, as Defendants point out, referenced in transmittal letters that were contained in the bank's records. However, these brief references would not enable a bank examiner to understand the agreement.[2] Bank regulators would not, merely by reading that a letter agreement, not contained in the bank's files, had been transmitted under two separate cover letters, be aware

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[2] A July 23, 1987 transmittal letter from Moore & Peterson, the attorneys for Old Sunbelt, to Texas Commercial Title Company indicates that the attorneys sent the title company

> 7. One (1) original executed letter from Lender to J. Walter McCrory, Thomas J. Ryan, III, and First Florida Management Associates ("Letter Agreement").

(footnote continues)

that the limitation on the liability of those assuming liability for the note under the Assumption Agreement. *See Fair* v. *NCNB Texas National Bank*, 733 F.Supp. 1099, 1104-5 (N.D. Tex. 1990).

Under *D'Oench Duhme*, the agreement to be relied upon must be documented in the financial institution's files so that banking authorities can determine the value of the institution's assets. Defendant argues that the agreement was "contructively" in the bank's files because it was contained in the files of the bank's attorneys, which were in the Old Sunbelt building. The fact that the document was physically in the bank building cannot remove the bar of *D'Oench Duhme*. The agreement, even if stored in a file belonging to an attorney for the bank, would not be apparent to an examiner inspecting the *bank's* documents.

In sum, Defendants FFMA, W. McCrory and Ryan cannot rely on the letter agreement limiting their liability because that agreement is excluded under *D'Oench Duhme*. The Cross Motion for Summary Judgment is therefore **DENIED**.

Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment on the promissory note claim. In response, Defendants do not dispute that the note is in default; instead, Defendants C. and M. McCrory argue that Plaintiff is not entitled to recover because it breached the loan agreement and charged usurious interest and fees. They further argue that their release of their claims against Plaintiff, contained in the Assumption Agreement, is invalid for lack of consideration: the release, they argue, was

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(footnote continued)

A July 24, 1987 letter from Kroney-Silverman, attorneys for W. McCrory and NPT, to Sunbelt lists the following document as one of seventeen documents examined:

> 10. Letter Agreement dated July 23, 1987 from Transferee, [NPT], to Noteholder, [Old Sunbelt].

given in consideration for Old Sunbelt's promise (in the side letter agreement) not to hold FFMA, W. McCrory and Ryan personally liable; since that promise was broken, Defendants say, the release without the side letter agreement fails for lack of consideration.

A noteholder is entitled to recover if it can prove: (1) that the note was executed; (2) that the note is in default; (3) that it is the present owner of the note; and (4) that a certain balance is due and owing. Tex. Bus. & Com. Ann. §3.307(b); *B. L. Nelson and Assoc., Inc.* v. *Sunbelt Savings, FSB*, 733 F.Supp. 1106, 1109-10 (N.D. Tex. 1990); *Hooper* v. *Mercantile Bank & Trust*, 762 S.W. 2nd 383, 385-85 (Tex. App. - San Antonio 1988, no writ).

It is undisputed that: (1) both the Modification Note and the Assumption Agreement were executed; (2) the Modification Note has been in default since August, 1988, and in September 1988, when Defendants did not make payments in arrears when such payments were demanded, all unpaid amounts on the Modification Note became immediately due and payable; (3) Plaintiff holds the Modification Note and the Assumption Agreement; and (4) Defendants owe certain outstanding sums.

Asserting defenses of breach of contract and usury, Defendants acknowledge that they released these defenses in the Assumption Agreement, but argue that the release was given in consideration for the limitation of liability (in the separate letter agreement). As described above, the *D'Oench Duhme* doctrine prohibits reliance on the letter agreement limiting the liability of FFMA, W. McCrory and Ryan to their investment in FFMA.

The letter agreement containing the limitation of Defendants' liability is not part of the Asumption agreement and is nowhere referred to or relied on in the Assumption Agreement as consideration or otherwise. The Assumption

Agreement shows on its face adequate consideration. It follows that Defendants cannot rely on the letter agreement as consideration for the Assumption Agreement. Such an argument simply sidesteps *D'Oench Duhme*; to give effect to Defendants' lack of consideration argument would be to give effect to a side agreement, *viz.*, the letter agreement, which is excluded by *D'Oench Duhme*.

Accordingly, the release of the breach of contract and usury claims in the Assumption Agreement is valid, and C. and M. McCrory may not assert those defenses to Plaintiff's claim here. Plaintiff's Motion for Summary Judgment is therefore **GRANTED**.

Plaintiff shall submit a proposed judgment by noon, October 18, 1990.

SO ORDERED.

DATED: October 5, 1990.

BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

SUNBELT SAVINGS, FSB, *Plaintiff* v. CHARLES MCCRORY, MARGARET A. MCCRORY, FIRST FLORIDA MANAGEMENT ASSOCIATES, WALTER MCCRORY AND THOMAS J. RYAN, III, *Defendants*	Civil Action No. 3-89-2474-H

MEMORANDUM OPINION AND ORDER

Before the Court are the Plaintiff's Motion for Summary Judgment on the Defendants' Counterclaims, filed October 22, 1990; the Defendants' Response, filed November 26, 1990; and the Plaintiff's Reply, filed December 3, 1990.

The parties previously filed cross-motions for summary judgment. On October 9, 1990, the Court issued a Memorandum Opinion and Order ruling on those motions and holding that the Defendants' defenses of breach of contract, usury, waiver, and estoppel are barred by the *D'Oench Duhme* doctrine. The facts underlying this dispute are outlined in the October 9, 1990 Order.

The Plaintiff now seeks summary judgment on the Defendants' counterclaims of breach of contract, usury, waiver, estoppel and fraud. The Defendants only dispute the portion of the Plaintiff's motion concerning the fraud claim.

The *D'Oench Duhme* doctrine bars both defenses and counterclaims that are based on unrecorded side agreements.

Kilpatrick v. *Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990). Accordingly, the Defendants' counterclaims of breach of contract, usury, waiver and estoppel are barred.

The Defendants argue that under *Langley* v. *Federal Deposit Ins. Corp.*, 484 U.S. 86 (1987), claims of fraud in factum are exempt from the bar of the *D'Oench Duhme* doctrine. *Langley*, a case under 12 U.S.C. § 1823(e), the statutory counterpart to *D'Oench Duhme*, involved a claim of fraud in the inducement. There, the Court held that the fraud in the inducement claim was barred, but added that a claim of fraud in factum would not be barred under the statute.

The Fifth Circuit has found that the Supreme Court's comments regarding fraud in factum claims are dicta and that such claims are therefore not exempt from the *D'Oench Duhme* doctrine. *Templin* v. *Weisgram*, 867 F.2d 240, 242 (5th Cir. 1989) (interpreting 12 U.S.C. § 1823(e)); *McLemore* v. *Landry*, 898 F2d 996 (5th Cir. 1990) (interpreting *D'Oench Duhme* doctrine). Accordingly, under Fifth Circuit precedent, the Defendants' fraud in factum claim is also barred under *D'Oench Duhme*.

Even if their claims were not barred by *D'Oench Duhme*, the Defendants would not be entitled to recover on their fraud in factum claim. To prove fraud in factum, a party must show that as a result of another party's actions, it signed a document without full knowledge of the document's essential terms. *Templin*, 867 F.2d at 242. Here, Walter McCrory and Thomas Ryan signed the Assumption Agreement,[1] knowing that the non-recourse provision was not included in the Assumption Agreement, but was included in the side Letter Agreement. Walter McCrory and Thomas Ryan Affidavits, attached to August 17, 1990 Cross-Motion for Summary

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[1] Walter McCrory and Thomas Ryan are general partners of First Florida Management Association, ("FFMA"). FFMA, in turn, is a general partner of North Park Terrace, which is a party to the Assumption Agreement and Letter Agreement.

Judgment submitted by First Florida Management Associates, Walter McCrory and Thomas Ryan. Therefore, the Defendants knew of the essential terms of the documents they signed and cannot recover on their fraud in factum claim.

Accordingly, the Plaintiff is **GRANTED** summary judgment with regard to the Defendants' counterclaims of breach of contract, usury, waiver, estoppel and fraud.

By *noon, December 13*, counsel will submit a joint report setting forth the issues remaining for adjudication in light of this Opinion.

SO ORDERED.

DATED: December 5, 1990.

BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS